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# Constitutional Law - Action Against the State

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## Notes

**CONSTITUTIONAL LAW—ACTION AGAINST THE STATE**—The Jefferson Lake Sulphur Company brought suit against the State of Louisiana for the recovery of what it claimed to be its share of the \$1,427,826.51 which the state had recovered in a previous suit against a salt mining company.<sup>1</sup> Louisiana Senate Bill 281 of 1944, authorizing the plaintiff to institute suit against the state, was passed by both houses of the legislature but vetoed by the governor. The court held that approval by the governor of legislative action authorizing suit against the state is not necessary. On the merits (which will not be considered in this note) the court allowed recovery of plaintiff's claim of \$897,465.72, rejecting a rather ingenious argument of the state that plaintiff's recovery should be limited to the amount of profit it would have made had it actually mined the salt itself, an operation that would have been quite expensive to undertake since the plaintiff was not equipped with any facilities to mine or market salt. *Jefferson Lake Sulphur Company v. State*, 213 La. 1, 34 So. (2d) 331 (1947).

Prior to the 1946 amendment,<sup>2</sup> Article III, Section 35, of the Louisiana Constitution of 1921 provided "Whenever the Legislature shall authorize suit to be filed against the State, it shall provide a method of procedure and the effect of the judgments which may be rendered therein." Since the present suit was

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1. *State v. Jefferson Island Salt Mining Co., Inc.*, 183 La. 304, 163 So. 145 (1935). The defendant had mined salt from the bed of Lake Peigneur which the court decided was the property of the state since the lake was found to be navigable in 1812. The court found the trespass to be wilful and in bad faith and assessed damages based on the market value per ton of the salt at the mouth of the mine during the period of trespass, without allowing deduction for expenses incurred.

2. La. Act 385 of 1946: "Whenever the Legislature shall authorize suit to be filed against the State it shall provide the method for citing the State therein and shall designate the court or courts in which the suit or suits authorized may be instituted and may waive any prescription which may have accrued in favor of the State against the claim or claims on which suit is so authorized. The procedure in such suits, except as regards citation and original jurisdiction, shall be the same as in suits between private litigants, but no judgment for money rendered against the State shall be satisfied except out of monies appropriated by the Legislature for the purpose. For the purpose of such suits the State shall be considered as being domiciled in the Capitol. No such suit shall be instituted in any court other than a Court of Louisiana. Except as otherwise specially provided in this section, the effect of any authorization by the Legislature for a suit against the State shall be nothing more than a waiver of the State's immunity from suit insofar as the suit so authorized is concerned."

initiated prior to the amendment and since the amendment deals only with procedure, for the purpose of this note further discussion of it will be omitted.

The majority opinion was based almost entirely on the "plain meaning" interpretation of Article III, Section 35, given in *Lewis v. State*.<sup>3</sup> In the *Lewis* case the court held that since the article does not *expressly* provide either that permission must be given by *law* or *statute* or that approval of the governor is necessary, the legislature can authorize suit against the state by joint resolution, without approval of the governor.

Justice Ponder's dissenting opinion pointed out that any statement made in the *Lewis* case on this question must be considered dictum since not only was an interpretation of Article III, Section 35, unnecessary for the decision of that case, but the court specifically stated that the act became a *law* by limitation. His opinion also pointed out that "There are many expressions in our Constitution that 'the Legislature shall provide' where it is contemplated that it shall provide by law but does not specifically say that it shall provide *by law*."<sup>4</sup>

The majority opinion in both the present case and the *Lewis* case were predicated on the theory that authority for the state's immunity from suit is derived from the constitution. Particular emphasis was placed on the specific wording of Article III, Section 35. There appears to be ample authority,<sup>5</sup> however, for the position taken by the dissent—that a state's right of immunity from suit is a sovereign right and that the constitution merely fixes the responsibility of the legislature for providing the "law of procedure and the law governing the effect of the judgment."<sup>6</sup>

A thorough search of the jurisprudence in other states as well as Louisiana fails to reveal any case in which the specific issue was raised relative to the necessity of approval by the governor. In each instance the act was submitted to the governor for his signature and the act became law either by limitation or by signature. In two Kentucky cases<sup>7</sup> the legislature waived its immunity by a joint resolution, although the state constitution

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3. 207 La. 194, 20 So. (2d) 917 (1945).

4. 34 So. (2d) 331, 343 (La. 1947).

5. *Beers v. Arkansas*, 61 U. S. 527, 529, 15 L. Ed. 991, 992 (1858); *State v. Burke*, 33 La. Ann. 969 (1881); *Carter v. State*, 49 La. Ann. 1488 (1897); *Durbridge v. State*, 117 La. 841, 42 So. 337 (1906); *Hood v. State*, 120 La. 806, 45 So. 733 (1908); *Doe ex dem, State Land Co. v. Factors & Traders Ins. Co.*, 166 Ala. 63, 51 So. 991 (1909); *Hamilton*, *Federalist* No. 81.

6. 34 So. (2d) 331, 343 (La. 1947).

7. *Commonwealth v. Haly*, 106 Ky. 716, 51 S.W. 430 (1899); *Commonwealth v. Lyon*, 24 Ky. Law Rep. 1747, 72 S.W. 323 (1903).

provided it was to be done *by law*. In each case the act was held to be constitutional, but the court pointed out that the signature of the governor was secured. It is interesting to note also that in many of the Louisiana cases prior to the present one, the court spoke of the *statute* or *law* authorizing suit.<sup>8</sup>

However, whatever doubt existed on this question after the *Lewis* case has now apparently been clarified. It is probable that whatever nomenclature is given an act waiving the state's immunity from suit (statute, law,<sup>9</sup> act, or joint resolution) approval by the governor is unnecessary and his veto will be ineffectual.<sup>10</sup>

The ruling in this case works a decided advantage for persons seeking permission to sue the state. Not only is it often improbable that a legislature will override the veto of a private bill, but under the Louisiana legislative system many acts are vetoed after the legislature has adjourned, which normally necessitates a two-year waiting period before another bill can be introduced.

The elimination of the possibility of a veto by the governor whittles away some of the protection from suit a state enjoys. Such protection has been severely criticized<sup>11</sup> as being outmoded, unjust and inequitable in view of the vast and rapid expansion of state activities in recent years, the delay in waiting for the legislature to convene, et cetera.

Perhaps as a result of such criticism, there is a definite trend among the states to abrogate the obsolete fiction that "The King Can Do No Wrong." Three states, New York, Illinois and Michigan, have followed the federal government in waiving its immunity and have set up state courts of claims, meeting sev-

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8. *Durbridge v. State*, 117 La. 841, 849, 42 So. 337, 339 (1906); *D'Asaro v. State*, 204 La. 974, 978, 16 So. (2d) 538, 539 (1944); *Crain v. State*, 23 So. (2d) 336, 338, 339, 340 (La. App. 1945).

9. "Whether the authority is granted by special act or by resolution of the Legislature it must be considered a *law* within the contemplation of Article 7, Section 10 of the Constitution which gives this Court exclusive jurisdiction when a law of this State has been declared unconstitutional." (Italics supplied.) *Fouchaux v. Board of Com'rs of Port of New Orleans*, 35 So. (2d) 738, 739 (La. 1948).

10. A test case for this ruling may arise in the very near future. Some of the bills passed by the 1948 Louisiana legislature were vetoed by the governor, including La. Senate Bill 352, authorizing suit against the state, and La. House Bills 488 and 489, both authorizing suit against the Department of Public Safety.

11. Borchard, *Government Liability in Tort* (1924) 34 *Yale L. J.* 1; (1926) 36 *Yale L. J.* 1; (1928) 28 *Col. L. R.* 577; Angell, *Sovereign Immunity—The Modern Trend* (1925) 35 *Yale L. J.* 150; Maguire, *State Liability for Tort* (1916) 30 *Harv. L. Rev.* 20.

eral times each year. Fourteen states<sup>12</sup> have authorized suits by a general law, when the terms of the statute are fully complied with and when the plaintiff is included in one of the classes set out in the statute. In some states<sup>13</sup> administrative tribunals hear claims against the state.

The *Jefferson Lake Sulphur* case decision seems to be in keeping with the modern trend of gradually stripping a state of its immunity from suit.

WILLIAM E. SKYE

CORPORATIONS—RIGHT TO INSPECT BOOKS AND RECORDS UNDER SECTION 38 OF THE BUSINESS CORPORATION ACT—Plaintiff, shareholder in Union Construction Company, Incorporated, as well as shareholder and director of Riverside Realty Company, Incorporated, sued to compel the latter company to allow him to inspect its books and records. Defendant resisted contending that plaintiff was a stockholder in a competing business and owned less than the twenty-five per cent of the stock of defendant corporation required by the Business Corporations Act<sup>1</sup> before inspection can be compelled. *Held*, "... the objects and purposes of the respondent corporation [Riverside Realty] and the Union Construction Co., Inc. are of such scope that either ... could engage in several types of business. Hence ... parol evidence was properly admitted to determine whether Union ... and the respondent ... are business competitors and ... this evidence reveals that they are not."<sup>2</sup> *Pittman v. Riverside Realty Company, Incorporated*, 36 So.(2d) 642 (La. 1948).

The requirement of ownership of a certain percentage of stock as a prerequisite to the inspection of corporate books is a recent innovation to corporation law.<sup>3</sup> The general rule as developed at common law afforded a right of inspection limited only by the requirement that such inspection be made at a reasonable

12. Arizona, California, Idaho, Indiana (contract claims only), Massachusetts, Minnesota, Nebraska, Nevada, North Carolina, North Dakota, South Dakota, Virginia (pecuniary claims only), Washington, Wisconsin.

13. Alabama, Arkansas, California, Idaho, Montana, Nevada, South Carolina, Tennessee, Utah.

1. La. Act 250 of 1928, as last amended by La. Act 34 of 1935 (4 E.S.) [Dart's Stats. (Supp. 1947) § 1080 et seq.]. For a discussion of this act in its entirety, see Bennett, *The Louisiana Business Corporation Act of 1928 (1940)* 2 LOUISIANA LAW REVIEW 644.

2. *Pittman v. Riverside Realty Co., Inc.*, 36 So.(2d) 642, 644 (La. 1948).

3. Although our act is patterned after the Model Business Corporations Act, this provision is entirely new. Of the three other states (Idaho, Washington and Kentucky) following the Model Act, none have a similar provision. Two states (New York and Illinois) require either a holding of stock